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Supreme Court of the United States

OCTOBER TERM, 1937

No. 55

MARY DUKE BIDDLE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF NATIONAL CASH REGISTER COMPANY, AS *AMICUS CURIAE*

BERNHARD KNOLLENBERG,
Counsel for National Cash Register Company, as Amicus Curiae.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

May it Please the Court:

The undersigned, as counsel for National Cash Register Company respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

BERNHARD KNOLLENBERG,
Counsel for National Cash Register Company, as Amicus Curiae.

SUPREME COURT OF THE UNITED STATES

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COMMISSIONER OF INTERNAL REVENUE,
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BRIEF OF NATIONAL CASH REGISTER COMPANY, AS *AMICUS CURIAE*.

I.

Statement.

The question involved in the case of *Biddle* v. *Commissioner* is whether a citizen of the United States who is a shareholder in a British corporation is entitled, under Section 131 (a) of the Revenue Act of 1928, to credit against his United States income taxes the amount withheld from a dividend declared by the British corporation in accordance with the British laws and system of collecting taxes at the source.

Substantially this same question is pending before the United States Court of Claims in the case of the *National Cash Register Company* v. *United States*. The only differences are that the National Cash Register Company is a

domestic corporation rather than an individual citizen of the United States and that the taxable year involved is a tax year covered by the Revenue Act of 1926 rather than a tax year covered by the Revenue Act of 1928. It is believed that the decision in the present case will be controlling in the National Cash Register Company case.

II.

Argument.

In computing the amount of United States income tax payable for 1929 on dividends received by Petitioner in that year from British-American Tobacco Co., Ltd., a corporation subject to British income tax, the Petitioner claimed as a credit against her United States income taxes the amounts deducted from her dividends as British income taxes. Petitioner claimed this credit pursuant to the provisions of Section 131 (a) of the Revenue Act of 1928 that:

> "The tax imposed by this title shall be credited with:
>
> "(1) *Citizen and Domestic Corporation.*—In the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States."

This provision had been construed by a series of rulings by the Bureau of Internal Revenue, (*Office Decision 147,* I. R. Cum. Bull. 1, p. 232, published April 9, 1919; *Solicitor's Memorandum 3040,* I. R. Cum. Bull. IV-1, p. 198, published March 17, 1925; *Solicitor's Memorandum 5363,* I. R. Cum. Bull. V-1, p. 89, published April 20, 1926; and *Income Tax*

Ruling 2401, I. R. Cum. Bull. VII-1, p. 126, published March 13, 1928), issued under earlier Acts containing a provision similar to that of the 1928 Act. These rulings held that British income taxes paid by corporations were "payments-at-the-source" on behalf of their stockholders, which, to the extent recouped from stockholders, were to be regarded as paid by the stockholders.

The Bureau's rulings on this point were unsatisfactory to corporations, subject to British income tax, which were incorporated or engaged in business in the United States, because, under these rulings, such corporations were not permitted to take as either a credit or a deduction such part of the British income taxes paid by them as they recouped out of the dividends declared by them. One of these corporations litigated the point, and in 1935, its contention that British income taxes payable on income from United States sources were deductible by the corporation as such in computing its net income subject to United States income tax was sustained by the United States Circuit Court of Appeals for the Ninth Circuit in *Welch* v. *St. Helens Petroleum Co., Ltd.*, 78 F. (2d) 631, in a case *arising under the Revenue Acts of 1918 and 1921.*

We submit that the decision in the *St. Helens* case was erroneous. But even if it is correct, the Commissioner's position that the decision in the *St. Helens* case, arising under the *1918* and *1921* Acts, is *ipso facto* decisive as to the construction of the similar and related provisions of the *1926* and *1928* Acts, is *not* sound. The Commissioner's position on this point, we submit, runs counter to one of the most frequently applied and useful rules of construction laid down by this Court, namely, that where a Federal statute has had a long-established and consistent administrative construction and the statute is thereafter re-enacted

without substantial change, this Court will conclusively presume (except in special circumstances, hereinafter described, which do not exist in the present case) that Congress intended, *in the later act,* to adopt the meaning that the administrative officials had placed upon the earlier act.

New Haven R. R. v. *I. C. C.,* 200 U. S. 361 (1906), Interstate Commerce;

United States v. *Falk,* 204 U. S. 143 (1907), Tariff;

Copper Queen Co. v. *Arizona,* 206 U. S. 474 (1907), State Property Tax;

United States v. *Cerecedo,* 209 U. S. 337 (1908), Tariff;

Komada v. *U. S.,* 215 U. S. 392 (1910), Tariff;

National Lead Co. v. *U. S.,* 252 U. S. 140 (1920), Tariff;

United States v. *Anderson,* 269 U. S. 422 (1926), Internal Revenue;

Nagle v. *Loi Hoa,* 275 U. S. 475 (1928), Immigration;

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United States v. *Farrar,* 281 U. S. 624 (1930), Liquor Prohibition;

Poe v. *Seaborn,* 282 U. S. 101 (1930), Internal Revenue;

Burnet v. *Thompson Oil & Gas Co.,* 283 U. S. 301 (1931), Internal Revenue;

McCoughan v. *Hershey,* 283 U. S. 488 (1931), Internal Revenue;

Old Colony R. R. v. *Commissioner,* 284 U. S. 552 (1932), Internal Revenue;

Murphy Oil Co. v. *Burnet,* 287 U. S. 299 (1932), Internal Revenue;

Costanzo v. *Tillinghast,* 287 U. S. 341 (1932), Immigration;

Mass. Mutual Life v. *Commissioner*, 288 U. S. 269 (1933), Internal Revenue;

United States v. *Dakota-Montana Co.*, 288 U. S. 459 (1933), Internal Revenue;

Reinecke v. *Smith*, 289 U. S. 172 (1933), Internal Revenue;

Alaska S. S. Co. v. *U. S.*, 290 U. S. 256 (1933), Admiralty;

Helvering v. *Bliss*, 293 U. S. 144 (1934), Internal Revenue;

Zellerbach Paper Co. v. *Helvering*, 293 U. S. 172 (1934), Internal Revenue;

Old Mission Portland Co. v. *Helvering*, 293 U. S. 289 (1934), Internal Revenue;

Herring v. *Commissioner*, 293 U. S. 322 (1934), Internal Revenue;

Hartley v. *Commissioner*, 295 U. S. 216 (1935), Internal Revenue;

McFeeley v. *Commissioner*, 296 U. S. 102 (1935), Internal Revenue;

Morrissey v. *Commissioner*, 296 U. S. 344 (1935), Internal Revenue;

Helvering v. *Minnesota Tea Co.*, 296 U. S. 378 (1935), Internal Revenue;

Helvering v. *Watts*, 296 U. S. 387 (1935), Internal Revenue;

United States v. *Safety Car Heating Co.*, 297 U. S. 88 (1936), Internal Revenue.

This rule of construction is particularly helpful in connection with the interpretation of the Federal income tax acts. The complexity of these acts makes it almost impossible for lawyers to advise their clients with confidence as to what the current act means, except as to two classes of provisions; those which, either as contained in the act itself or as appearing in some earlier act, have been passed

upon by this Court and those which had appeared in a prior act and had been construed over a long period of time and with consistency by the Bureau of Internal Revenue at the time they were re-adopted.

It is of the essence of this rule that (1) it is applicable only to the construction of the *later* act and (2) it is applicable in the construction of such later act even though the Court, *as a matter of original impression,* would or might have adopted a different construction. It follows from this second proposition that even though the Court was right in the *St. Helens* case in rejecting the Bureau's construction of the deduction provisions of the *1918* and *1921* Acts as applied to British income taxes, it does not necessarily mean that the Court would have been justified in so holding as to the similar language of the *1926* and *1928* Acts. On the contrary, a review of the Bureau's position between the adoption of the 1921 Act and the adoption of the 1926 and 1928 Acts will show that any such holding would have been *erroneous,* because, at the time that Congress enacted these later Acts, the Bureau's construction of the provisions as to foreign income tax deductions and credits in the earlier acts (which the Court, in effect, rejected in the *St. Helens* case) had been long and consistently in force and was therefore presumably adopted by Congress in enacting these later acts, without change in the language of these provisions.

In April, 1919, the Bureau of Internal Revenue ruled, in *Office Decision 147* (*supra*), that:

> "Taxes imposed and required by a foreign government to be paid on the basis of dividends declared by corporations under its laws are taxes on the income

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*It will be noted that the above ruling related to taxes paid "*on the basis of dividends* declared by corporations" rather than "*on dividends*" so declared, thus clearly recognizing the peculiar situation with respect to dividends declared by *British* corporations.

of the individual stockholders in proportion to the amount of stock held. A United States corporation owning stock in a foreign corporation, taxed on this basis, should report in its return of annual net income for the year in which received its pro rata share of the entire dividend declared, and would be entitled to a credit of the amount of the tax paid by the foreign corporation to the foreign government in its behalf, in accordance with the above provision of law."

and, under this ruling, the Bureau consistently held for upwards of ten years that where a British corporation recouped itself for British income taxes out of dividends paid to its shareholders, the amounts so withheld were to be treated as taxes paid by such shareholders.

In March, 1925, the specific issue raised by the present case was ruled on by the then Solicitor of Internal Revenue in *Solicitor's Memorandum 3040* (*supra*). In this ruling the Solicitor re-affirmed the Bureau's long-established rule that British income taxes recouped by British corporations out of dividends declared to its shareholders, were to be regarded as having been paid by the shareholders. The headnote and more significant portions of this ruling are as follows:

"*Article 381: Analysis of credit for taxes.*

REVENUE ACTS OF 1918 AND 1921.

Where under the income tax act, 1918, of Great Britain, a tax is paid to the British Government by a British corporation on the basis of its profits and gains which is deductible by the corporation from the dividends paid its shareholders, such tax is a tax against the shareholders and may be taken as a credit by a citizen shareholder of the United States under section 222 of the Revenue Acts of 1918 and 1921.

An opinion is requested in connection with a claim filed by A, which is based upon credit for income taxes paid to a foreign country under the provisions of section 222(a) of the Revenue Acts of 1918 and 1921. The taxpayer held stock in a company incorporated and operating in England and received dividends in amounts representing the net cash distribution after the company had deducted from the dividend the proportionate part of the income tax paid by it to the British Government. The following questions are presented:

1. Where under the income tax act, 1918, of Great Britain, the tax on the corporation is assessed upon its gains and profits, and the corporation is permitted to deduct the proportionate part of such tax from dividends, is the tax paid a tax upon the shareholder; and,

2. May such a tax be credited against the tax liability of the citizen of the United States?

Section 222(a) of the Revenue Act of 1918 provides:

Sec. 222. (a) That the tax computed under Part II of this title shall be credited with:

In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States; and * * *.

Section 222(a) of the Revenue Act of 1921 is substantially the same as the foregoing. The basis of the credit for taxes is stated in article 381, Regulations 45, as 'the amount of any' such taxes paid or accrued 'during the taxable year to any foreign country, upon income derived from sources therein,' and

the meaning of 'taxes paid during the taxable year' is defined in article 382 as that 'paid or accrued during the taxable year on behalf of the individual claiming credit.' Under the income tax act, 1918, of Great Britain, which is an act to consolidate the enactments relating to income taxes, the tax upon corporate bodies is levied upon the profits and gains so that the full amount of earned and undistributed profits would be taxed in the hands of the corporation, but where dividends are declared, the corporation is permitted to deduct from such dividends a proportionate part of the tax before the distribution is made. The question that arises, therefore, is whether under that act the corporation is the taxable entity where taxes are deducted from dividends or whether taxes are accrued or paid to the British Government on behalf of the domestic shareholder so as to entitle him to credit for same under section 222. (Here follows a discussion of English decisions.)

* * * * * * * *

In view of these decisions, it is the opinion of this office that where under the income tax act, 1918, of Great Britain, a tax is paid to the British Government by a corporation on the basis of its profits and gains which is deductible by the corporation from the dividends paid its shareholders, such tax is a tax against the shareholders and may be taken as a credit by a citizen shareholder of the United States under section 222 of the Revenue Acts of 1918 and 1921. Although the corporation is held chargeable to tax, the decisions cited above construe the provision permitting the deduction of taxes from dividends as being a payment of tax on behalf of the shareholders, or a collection at the source. It is concluded, therefore, that in the instant case where a citizen of the United States receives dividends from a British corporation, from which a proportionate part of the tax

paid to the British Government has been deducted, such payment of tax comes within the contemplation of section 222(a) of the Revenue Acts of 1918 and 1921 as a tax paid to a foreign country."

The Revenue Act of 1926 was approved on *February 26, 1926*. At that time the Bureau had, for seven years, consistently and publicly held that British income taxes on corporations were to be treated as taxes on the shareholders and had recently published *S. M. 3040* re-affirming its position. Under these circumstances, can there be any question but that the rule of construction relied on by the Petitioner is applicable in construing the provisions of the *1926* Act? The answer is plainly "No". And, by the time the Revenue Act of *1928* was approved, on *May 29, 1928*, the Bureau's rule of construction was even more firmly established by a re-affirmance of the earlier rulings in *Solicitor's Memorandum 5363* (*supra*), published *April 20, 1926*, and *Income Tax Ruling 2401* (*supra*), published *March 13, 1928*.

The Commissioner contends that the rule of construction relied on by the Petitioner is not applicable in the present case because the Bureau's rulings as to the credit for British income taxes, issued prior to the adoption of the Revenue Acts of 1926 and 1928, were based on a misconception of the nature of British income taxes on corporations.

Petitioner submits that the particular reason for the Commissioner's error in construction (if there was error) is immaterial and cannot affect the applicability of the rule. Of course, if the Commissioner's ruling were clearly in conflict with the provisions of the statute or would lead to absurd consequences the rule would concededly not apply. But these are wholly different points from the one now relied on by the Commissioner.

The Commissioner does not and could not maintain that the allowance of British corporation income taxes as a credit to United States shareholders of the corporation is clearly in conflict with the language of Section 131 (a) of the 1928 Act and similar language in earlier Acts. These Acts did not prescribe that the taxes to be allowed as a credit were limited to those "*assessed directly against such citizen.*" They provided merely that "the tax imposed by this title shall be credited with, in the case of a citizen of the United States and of a domestic corporation, the amount of *any income, war-profits and excess-profits taxes paid or accrued*" during the taxable year to any foreign country". It is evident, therefore, that the Bureau's prior rulings did not conflict with any specific language of the Acts.

Nor would the Bureau's prior rulings lead to absurd consequences. There is no less reason for Congress to permit American citizens who pay United States income taxes on dividends received from British corporations to credit the amounts withheld by such corporations to recoup themselves for income taxes paid to the British Government, than for Congress to permit corporations (mainly British), deriving income from United States sources, to credit against their United States taxes, income taxes paid by them to the British Government.

In conclusion, we refer to the fact that, in the other two Circuits, in which the question here at issue has been decided, the Courts have held that the language of the 1926 and 1928 Acts is to be construed in accordance with the prior long-established administrative construction of that language.

United Shoe Machinery Corpn. v. *White,* 89 F. (2d) 363 (C.C.A. 1);
Elkins v. *Commissioner,* 91 F. (2d) 534 (C. C. A. 3).

Surely if such construction were plainly in conflict with the language of the Acts or would lead to absurd consequences, these courts would not have been blind to such patent incongruity or absurdity.

It is submitted that for the reasons herein set forth, the rule of construction relied on by the Petitioner is applicable to and controls the present case.

Respectfully submitted,

BERNHARD KNOLLENBERG,
Counsel for National Cash Register Company, as Amicus Curiae.

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